

FILED

Dec 27 2017


CLERK

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

NATIVE AMERICAN COUNCIL OF
TRIBES, BLAINE BRINGS PLENTY, and
CLAYTON SHELDON CREEK,

Plaintiff,

vs.

DOUGLAS WEBER, Warden of the
South Dakota State Penitentiary; and
DENNIS KAEMINGK, Secretary of the
Department of Corrections;

Defendants.

4:17-CV-04159-KES

ORDER GRANTING MOTION TO
PROCEED IN FORMA PAUPERIS

Plaintiffs, Native American Council of Tribes (NACT), Blaine Brings Plenty, and Clayton Sheldon Creek, filed a complaint alleging defendants violated Religious Land Use and Institutionalized Persons Act (RLUIPA) by interfering with the Native American Organizations' financial accounts. Dockets 1 and 2. Creek requests leave to proceed in forma pauperis and provided a completed Prisoner Trust Account Report. Dockets 6 and 7.

Under the Prison Litigation Reform Act (PLRA), a prisoner who "brings a civil action or files an appeal in forma pauperis . . . shall be required to pay the full amount of a filing fee." 28 U.S.C. § 1915(b)(1). The court may, however, accept partial payment of the initial filing fee where appropriate. Therefore, "[w]hen an inmate seeks pauper status, the only issue is whether the inmate

pays the entire fee at the initiation of the proceedings or over a period of time under an installment plan.' " *Henderson v. Norris*, 129 F.3d 481, 483 (8th Cir. 1997) (quoting *McGore v. Wigglesworth*, 114 F.3d 601, 604 (6th Cir. 1997)).

The initial partial filing fee that accompanies an installment plan is calculated according to 28 U.S.C. § 1915(b)(1), which requires a payment of 20 percent of the greater of:

- (A) the average monthly deposits to the prisoner's account; or
- (B) the average monthly balance in the prisoner's account for the 6-month period immediately preceding the filing of the complaint or notice of appeal.

Creek has reported average monthly deposits to his prisoner trust account of \$54.48 and an average monthly balance of \$30.84. Docket 6. Based on this information, the court grants plaintiffs leave to proceed in forma pauperis provided Creek pays an initial partial filing fee of \$10.89, which is 20 percent of \$54.48. Creek must pay this initial partial filing fee by January 26, 2018. If the court does not receive payment by this deadline, this matter will be dismissed. Creek may request an extension of time if needed.

In addition to the initial partial filing fee, Creek must "make monthly payments of 20 percent of the preceding month's income credited to the prisoner's account." 28 U.S.C. § 1915(b)(2). The statute places the burden on the prisoner's institution to collect the additional monthly payments and forward them to the court as follows:

After payment of the initial partial filing fee, the prisoner shall be required to make monthly payments of 20 percent of the preceding month's income credited to the prisoner's account. The agency having custody of the prisoner shall forward payments from the

prisoner's account to the clerk of the court each time the amount in the account exceeds \$10 until the filing fees are paid.

28 U.S.C. § 1915(b)(2). Therefore, after payment in full of the initial partial filing fee, the remaining installments will be collected pursuant to this procedure.

The clerk of the court will send a copy of this order to the appropriate financial official at Creek's institution. Creek will remain responsible for the entire filing fee, as long as he is a prisoner, even if the case is dismissed at some later time. *See In re Tyler*, 110 F.3d 528, 529–30 (8th Cir. 1997).

Thus, it is ORDERED

1. Creek's motion for leave to proceed in forma pauperis (Docket 3) is granted. **Creek will make an initial partial payment of \$10.89 by January 26, 2018**, made payable to the Clerk, U.S. District Court. If the initial partial filing fee is not received by the specified deadline, the case **will be dismissed**.
2. After payment of the initial partial filing fee, Creek's institution will collect the additional monthly payments in the manner set forth in 28 U.S.C. § 1915(b)(2), quoted above, and will forward those installments to the court until the \$350 filing fee is paid in full.
3. The clerk of the court is directed to send a copy of this order to the appropriate official at Creek's institution.
4. The clerk of the court is directed to set a pro se case management deadline in this case using the following text: January 26, 2018: initial partial filing fee payment due.

5. Creek will keep the court informed of his current address at all times. All parties are bound by the Federal Rules of Civil Procedure and by the court's Local Rules while this case is pending.

DATED this 27th day of December, 2017.

BY THE COURT:

/s/ Karen E. Schreier

KAREN E. SCHREIER

UNITED STATES DISTRICT JUDGE